87-874

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO.

TIMOTHY C. SHASHATY,

Petitioner

- vs -

STATE OF CONNECTICUT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. Did the admission of the defendant's pre-arrest, but post-Miranda, silence deny him due process of law in violation of Doyle v. Ohio and Wainwright v. Greenfield?

2. Have the circuits formulated conflicting standards for measuring the harmfulness of Doyle violations?

3. Was the admission of the defendant's pre-arrest, but post-Miranda, silence harmless error?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
OPINION BELOW.....	2
JURISDICTION.....	3
QUESTIONS PRESENTED.....	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE WRIT.....	17
I. THE ADMISSION OF THE DEFENDANT'S PRE-ARREST, BUT POST-MIRANDA, SILENCE DENIED HIM DUE PROCESS OF LAW IN VIOLATION OF DOYLE V. OHIO AND WAINWRIGHT V. GREENFIELD.....	17
II. THE CIRCUITS HAVE ADOPTED CONFLICTING STANDARDS FOR MEASURING THE HARMFULNESS OF DOYLE VIOLATIONS.....	20

III. THE ADMISSION OF THE DEFENDANT'S PRE-ARREST, BUT POST-MIRANDA, SILENCE WAS HARMLESS ERROR..... 26

CONCLUSION..... 29

TABLE OF AUTHORITIES

	Page
Alderman v. Austin, 695 F.2d 124, 125 (5th Cir., Unit B, 1983).....	23,24
Anderson v. Charles, 447 U.S. 404, 408 (1980).....	19
Chapman v. California, 386 U.S. 18 (1967).....	21
Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir.), cert. denied, 431 U.S. 908 (1977).....	20,21, 23,27
Doyle v. Ohio, 426 U.S. 610 (1976).....	17,18, 19,20, 23,25, 27
Hawkins v. LeFevre, 758 F.2d 966 (2d Cir. 1985).....	21
Jenkins v. Anderson, 447 U.S. 238, 240 (1980).....	18,19
Martin v. Foltz, 773 F.2d 711 (6th Cir. 1985).....	22

Matire v. Wainwright,
811 F.2d 1430
(11th Cir. 1987)..... 24

United States v. Cumminskey,
728 F.2d (3d Cir. 1984),
cert. denied, ___ U.S. ___,
105 S.Ct. 1869 (1985)..... 21

United States v. Disbrow,
768 F.2d 976
(8th Cir. 1985) 22

United States v. Elkins,
774 F.2d 520
(1st Cir. 1985)..... 21

United States v. Harrold,
796 F.2d 1275, 1280
(10th Cir. 1986)..... 25

United States v. Meneses-Davila,
580 F.2d 888
(5th Cir. 1978)..... 23,24

United States ex rel. Miller
v. Greer,
789 F.2d 438
(7th Cir. 1986)..... 22,23

United States v. Ortiz,
776 F.2d 864
(9th Cir. 1985)..... 22

United States v. Remigio,
767 F.2d 730
(10th Cir. 1985)..... 22,25

United States v. Ruz-Salazar,
764 F.2d 1433
(11th Cir. 1985)..... 22

Velard v. Shulsen,
757 F.2d 1093
(10th Cir. 1985)..... 22

Wainwright v. Greenfield,
474 U.S. 284 (1986)..... 17,20,
22

Williams v. Zahradnick,
632 F.2d 353
(4th Cir. 1980)..... 21,22,
25

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STATE OF CONNECTICUT

The Petitioner, TIMOTHY C. SHASHATY, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on August 18, 1987.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 205 Conn. 39 (1987), and appears in the Appendix hereto. The opinion of the Appellate Court of the State of Connecticut is reported at 8 Conn. App. 387 (1986) and appears in the Appendix hereto.

JURISDICTION

The opinion and decision of the Supreme Court of the State of Connecticut was entered on August 18, 1987. A timely petition for reargument to that Court was denied on September 23, 1987. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the admission of the defendant's pre-arrest, but post-Miranda, silence deny him due process of law in violation of Doyle v. Ohio and Wainwright v. Greenfield?

2. Have the circuits formulated conflicting standards for measuring the harmfulness of Doyle violations.

3. Was the admission of the defendant's pre-arrest, but post-Miranda, silence harmless error?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

U.S. Constitution, Amendment XIV:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Timothy C. Shashaty was convicted following a jury trial in the Connecticut Superior Court of the crimes of sexual assault in the first degree and unlawful restraint in the first degree, C.G.S. §§53a-70(a); 53a-95(a), respectively.

According to testimony at trial, Samantha Godo, who was a high school senior in March 1983 attended a party at the home of her friend Emily Lewis. Alcohol and beer were served at the party and Samantha drank between eight and ten 10 ounce glasses of beer. One of the twenty people at the party was the defendant who engaged her in "small talk" and drove her to the store for cigarettes.

Godo became involved in a fist fight with another girl at the party, became

hysterical and was injured. Godo claimed that Shashaty ministered to her after the fight.

When the party broke up, Godo claimed that she, the defendant, Emily and Emily's boyfriend were the only guests who stayed behind. She claimed that she talked to the defendant for half an hour, that he tried to kiss her a few times, but she rebuffed him; she claimed that around 11:30 p.m. she started to walk home alone. She further claimed that Tim Shashaty caught up with her, entreated her to walk along with him, but she continued to rebuff him. She claimed that he began to walk down the street with her, that he picked her up and carried her over his shoulder; she claimed he agreed to put her down if she would walk and hold hands with him. She agreed to

this and they walked hand in hand. She claimed that he picked her up over his shoulder again and, although she was screaming, carried her through the yards of several residences before putting her down on the grass where he held her down, removed her pants and had sexual relations with her. She did not claim any force. After this she walked home; she told Emily she had had a problem, but did not report the incident until the following day when she called the police.

Four days later, on March 10, 1983, two Milford police officers drove to the defendant's home, awakened him and "informed him that his name had come up in an investigation." Lieutenant William Graham asked the defendant to meet him at the police station to discuss the matter; the defendant

agreed, and went to the station that afternoon. At that interview, Shashaty asserted his innocence. After having been given full Miranda warnings, Shashaty made a written statement claiming that he had left the party with his girlfriend, Melissa Junget, Billy McClafferty and Maryann Kopec in Ms. Kopec's car and that he was driven to his house where he went to bed. Prior to signing this typewritten transcript of the account, the defendant was advised of his rights under Miranda v. Arizona and signed a standard waiver form.

On March 23, 1983, the defendant was arrested and formally charged.

At trial, Junget, McClafferty, Kopec and the hostess testified that Shashaty had stayed behind at the Lewis home after the others had departed.

Forensic evidence supported the presence of seminal fluid on the crotch of Godo's underpants, but determined that no pubic or ordinary hair obtained from her were Shashaty's.

Shashaty took the stand in his own defense and testified that he had stayed at the Lewis party, had expected to ride home with Lewis's boyfriend, but when the boyfriend remained at Lewis's house, he left on foot and hitched a ride home. He testified he was picked up by a driver named "Mark" whose last name he never learned. He also testified that when the two detectives came to his house and questioned him shortly after he was awakened, he told them that he had left the party with his girlfriend Melissa Junget and others. He did not tell the truth to the police

because "I was scared....I was afraid and I just figured it would take me out of involvement if I had answered that." (Tr. pp. 250-51, 255) The defendant further testified that because of a serious automobile accident, he suffered chronic low back pain and was unable to lift heavy objects.

On rebuttal, the State was permitted over the defendant's objection to present further testimony from Lt. William Graham, asserting that between the date of the defendant's written statement and the date of his subsequent arrest, the defendant did not make any corrections to his written statement and did not report to the police anything about hitching a ride. Lt. Graham was therefore permitted to place in evidence before the jury at the crucial rebuttal stage of the trial, evidence of the de-

fendant's pre-arrest, post-Miranda silence.

In addition, in its charge to the jury, the Court gave a "missing witness" instruction regarding the defendant's "failure" to call as a witness the driver Mark who he claimed had given him a ride home after the party.

The defendant appealed his conviction to the Appellate Court of the State of Connecticut. In an opinion at 8 Conn. App. 387 (1986), the Appellate Court ruled that the trial court had violated both Mr. Shashaty's Fifth and Fourteenth Amendment rights by allowing the State to present evidence of his post-Miranda silence. The Appellate Court further ruled that the trial court had unlawfully given "missing witness" jury instructions since absolutely no legal basis for such an instruction

existed. The Appellate Court further held that the "missing witness" instruction which was erroneously given did not correctly state the law.

Despite these three errors, the Appellate Court held that the defendant had received a fair trial. The Appellate Court reasoned that the defendant had the burden of showing harmful error in regard to the "missing witness" charge. However, the Appellate Court found that the prosecution had the burden of showing the harmlessness of the error in regard to post-Miranda silence.

Applying both standards, the Appellate Court ruled against the defendant holding that the defendant had failed to show the harmfulness of the missing witness error and that "this case presents one of those

'few instances'...where the [Doyle] error was harmless." 8 Conn. App. at 394.

Following the Appellate Court's affirmance of the trial court judgment, the Supreme Court of Connecticut, upon defendant's petition for certification, agreed to hear his appeal. The Supreme Court of Connecticut agreed with the Appellate Court Court that the trial court had erroneously instructed the jury as follows: "It is the law of the State that the failure of a party to call a witness or witnesses who are within its power to produce entitles you, the jury, to infer that the testimony of such witness or witnesses would be unfavorable to that party.

"In this case, the defendant testified that, after leaving the party ... he hitchhiked and received a ride from a

person whose first name he knew to be Mark. Consistent with the rule I have just stated, you may consider the failure of the defendant to call this person."

The State conceded that it was unwarranted and incorrect as a matter of law for the trial court to give this instruction.

The Supreme Court of Connecticut agreed with the Appellate Court that the erroneous instruction engendered a claim arising under State law and did not, as the defendant claimed, involve any constitutional right. The Connecticut Supreme Court held that the defendant failed to carry his burden of proving harmful error.

However, on the principal issue of the appeal, whether the State can introduce evidence of a defendant's silence after he has received Miranda warnings but prior to

his arrest, the Supreme Court of Connecticut differed with the analysis of the Appellate Court. The Supreme Court of Connecticut disagreed with the Appellate Court which had found that the defendant was in police custody when he gave his false alibi statement. The Supreme Court of Connecticut found that the defendant was not under arrest or otherwise in custody, but declined to rule in this unsettled area of federal constitutional law. Despite the State having conceded at oral argument that it had offered its rebuttal evidence of the defendant's pre-arrest silence both to impeach the defendant's credibility and, substantively, to demonstrate his consciousness of guilt, the Connecticut Supreme Court refused to condemn the use of post-Miranda silence on rebuttal. In

refusing to condemn the State's use of pre-arrest, post-Miranda silence against the defendant, the Supreme Court of Connecticut obviated the need to reach this issue by holding that the admission of this silence was harmless beyond a reasonable doubt.

The Supreme Court of Connecticut denied Petitioner's motion to reargue on the grounds raised herein.

REASONS FOR GRANTING THE WRIT

I

THE ADMISSION OF THE DEFENDANT'S PRE-ARREST, BUT POST-MIRANDA, SILENCE DENIED HIM DUE PROCESS OF LAW IN VIOLATION OF DOYLE V. OHIO AND WAINWRIGHT V. GREENFIELD.

Despite the faulty reasoning of the Connecticut Supreme Court, there can be little doubt that the admission of pre-

arrest, but post-Miranda silence against the defendant ran afoul of the rule of Doyle v. Ohio, 426 U.S. 610 (1976), and deprived the defendant of fundamental fairness.

"Miranda warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him." Jenkins v. Anderson, 447 U.S. 238, 240 (1980).

The question of permissible uses of a defendant's silence does not devolve on the time of the silence, on whether it was post or pre-arrest silence, or on whether the defendant was in or out of custody. The sole determinative of the admissibility of silence depends on whether silence had been sustained as a result of government assur-

ances that the silence would not be used against the defendant. "Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." Anderson v. Charles, 447 U.S. 404, 408 (1980) As this Court made crystal clear in Anderson v. Charles, Doyle held simply "that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following Miranda warnings." Id., 407.

While Anderson and Jenkins compel the conclusion that all post-Miranda silence, whether custodial or non-custodial, is covered by the Doyle rule, the confused dicta of the Connecticut Supreme Court in trying to resolve the case at bar, underscores the need for this Court to explicitly rule on this open question. (See

Appendix pp. 21b-23b) The narrow reading by the Connecticut Supreme Court of this Court's decision in Wainwright v. Greenfield, 474 U.S. 284 (1986) suggesting that only arrested persons are entitled to Doyle protections, demands that this Court resolve this confusion. This Court must explicitly address the question of what precipitating events trigger Doyle rights.

II

THE CIRCUITS HAVE ADOPTED CONFLICTING STANDARDS FOR MEASURING THE HARMFULNESS OF DOYLE VIOLATIONS.

In deciding that the admission of post-Miranda silence against Timothy Shashaty was harmless error, the Connecticut Supreme Court purported to rely on the formulation of the Fifth Circuit in Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir.),

cert. denied, 431 U.S. 908 (1977): "When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error."

The circuits have uniformly applied the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967) to Doyle violations. United States v. Elkins, 774 F.2d 530 (1st Cir. 1985); Hawkins v. LeFevre, 758 F.2d 866 (2d Cir. 1985); United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1869 (1985); Williams v. Zahradnick, 632 F.2d 353 (4th Cir.

1980); Martin v. Foltz, 773 F.2d 711 (6th Cir. 1985); United States ex rel. Miller v. Greer, 789 F.2d 438 (7th Cir. 1986); United States v. Disbrow, 768 F.2d 976 (8th Cir. 1985): United States v. Ortiz, 776 F.2d 864 (9th Cir. 1985); United States v. Remigio, 767 F.2d 730 (10th Cir. 1985); United States v. Ruz-Salazar, 764 F.2d 1433 (11th Cir. 1985). There is little doubt of the vitality of the Doyle doctrine, particularly in light of this Court's strong application of the doctrine last term in Wainwright v. Greenfield, supra.

Despite an across the board interface of Chapman and Doyle, the Circuits have not standardized the measure of harmfulness in relation to Doyle violations. In Velard v. Shulsen, 757 F.2d 1093 (10th Cir. 1985) the

Tenth Circuit held that a Doyle violation can never be harmless when the case comes down to the word of the the key prosecution witness against the word of the defendant; In United States ex rel. Miller v. Greer, supra, the Seventh Circuit rejected a finding of harmless error analysis based on the factors of duration of the comment on silence, the corroboration of damaging testimony, and a curative instruction. The Seventh Circuit demanded that "overwhelming evidence" of guilt is necessary "to overcome constitutional error such as a Doyle violation." The Fifth Circuit has devised several different standards. See Chapman v. United States, supra and United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978); Alderman v. Austin, 695 F.2d 124,

125 (5th Cir., Unit B, 1983) The Eleventh Circuit, in Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987) seems to adopt the Meneses-Davila test: 1) when the prosecution links silence to the exculpatory story, reversible error results even if the story is transparently frivolous; 2) when the prosecutor does not directly tie the silence to the exculpatory story and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt is not overwhelming; 3) a single reference to silence, not linked to the defendant's story constitutes harmless error when the exculpatory story is transparently frivolous, and evidence of guilt is otherwise overwhelming. The Tenth and

the Fourth Circuits have considered the following factors determinative of harmfulness: The use and genesis of the silence testimony, the quantum of other inculpatory evidence, the intensity and frequency of the reference, and the opportunity for curative instruction or mistrial. United States v. Harrold, 796 F.2d 1275, 1280 (10th Cir. 1986); United States v. Remigio, supra; Williams v. Zahradnick, supra.

Given the alarming frequency of Doyle violations (as evidenced by the sheer number of reported decisions) this Court should adopt a strict harmless error standard not only to assure fundamental fairness and integrity in the criminal justice system, but also to provide a cogent harmless error analysis toward the

promotion of uniformity among the circuits.

III

THE ADMISSION OF THE DEFENDANT'S PRE-ARREST, BUT POST-MIRANDA, SILENCE WAS NOT HARMLESS ERROR.

In this case, the trial in its final analysis amounted to nothing more than a contest pitting the comparative credibility of the alleged victim against the credibility of the Petitioner. Petitioner's credibility was crucial to the issue of reasonable doubt. It is undoubtedly true, as was observed below that Petitioner's credibility had been undermined to some degree by his admitted false exculpatory statement to the police, yet each of the three errors committed by the trial court served but one purpose and that purpose was to undermine further the Petitioner's

credibility.

The Connecticut courts purported to rely on the harmless error formulation of Chapman v. United States, supra. However, as has been noted above, the Fifth Circuit has been loathe to slavishly follow Chapman. Nevertheless, even if Chapman were still good law, the application of the Chapman formulation to the case at bar clearly demonstrates that the Doyle error committed here was egregiously harmful and fundamentally effected the fairness of the trial.

There was not a "single reference" to the Doyle silence but several pages of testimony presented at the most crucial stage of the trial which represented the State's entire rebuttal case. The reference to silence was expressly linked with defendant's exculpatory story -- indeed,

its whole purpose was to rebut that exculpatory story; the exculpatory story manifestly was not "transparently frivolous"; and evidence of guilt was anything but overwhelming.

The harmless error standard should be evenhanded and uniform throughout the Circuits, the several states and in Connecticut. The misapplication of the harmless error doctrine to the case at bar, represents an egregious mischaracterization of law and undermines the integrity of the trial and appellate process.

CONCLUSION

Fundamental fairness demands that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted:

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50

APPENDIX

T A B L E O F C O N T E N T S

	Page
APPENDIX A (Denial of Motion for Reargument).....	1a
APPENDIX B (Decision of Supreme Court of Connecticut) State of Connecticut v. Timothy Shashaty, 205 Conn. 39 (August 18, 1987).....	1b
APPENDIX C (Decision of Appellate Court) State of Connecticut v. Timothy Shashaty, 8 Conn. App. 387 (August 5, 1986).....	1c

APPENDIX A

NO. 13061

STATE OF CONNECTICUT SUPREME COURT

V. STATE OF CONNECTICUT

TIMOTHY SHASHATY SEPTEMBER 23, 1987

O R D E R

THE MOTION OF THE DEFENDANT FILED AUGUST 27, 1987 FOR REARGUMENT AND RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT,

Carolyn Cunha Zeogos/s/
Asst. Clerk-Appellate

APPENDIX B

DECISION OF SUPREME COURT OF CONNECTICUT

STATE OF CONNECTICUT V. TIMOTHY SHASHATY

205 Conn. 39 (August 18, 1987)

PETERS, C.J., HEALEY, SHEA, CALLAHAN and COVELLO, Js.

SHEA, J. The Appellate Court upheld the judgment of the trial court rendered in accordance with a jury verdict finding the defendant guilty of the crimes of sexual assault in the first degree, in violation of General Statutes § 53a-70(a), and unlawful restraint in the first degree, in violation of General Statutes § 53a-95(a). State v. Shashaty, 8 Conn. App. 387, 513 A.2d 172 (1986). The Appellate Court ruled that the trial court had committed harmless error in (1) giving the jury an unwarranted

"missing witness" instruction, and (2) permitting the state to introduce evidence of the defendant's silence prior to his arrest but after receiving Miranda warnings. Having certified this appeal, we affirm the judgment of the Appellate Court.

Although the facts that the jury could reasonably have found are set forth in State v. Shashaty, supra, we summarize those pertinent to the issues in this appeal. On March 6, 1983, the victim, an eighteen year old high school girl, attended a party at a friend's home in Milford. The defendant, Timothy C. Shashaty, who had never met the victim before, also attended the party. At about 9 p.m. the defendant borrowed a car and drove the victim to a store to purchase cigarettes, at which time the two engaged

in "just small talk." Later in the evening, at about 11 p.m., after the victim had fought with another guest over the disappearance of the victim's purse, the defendant spoke with the victim, who had locked herself in the bathroom, for about ten minutes. When the victim went back downstairs, the two spoke again for about thirty minutes, during which time the defendant "tried to kiss [her] a few times." After resisting the defendant's advances, the victim, sometime between 12:30 and 1 a.m., left the party and began to walk home.

The defendant followed the victim and caught up with her on Gulf Street. When the victim rebuffed the defendant's demand that she walk with him, the defendant lifted her onto his shoulders and started

walking down the street. In response to the victim's screams, the defendant stated, "If I put you down, you have to let me hold your hand and walk with you." The victim acceded to the defendant's demand, and the two walked hand-in-hand for a while. When the victim eventually indicated that, in order to go home, she had to turn left, the defendant picked her up once again and, ignoring her screams, carried her toward the right. The defendant took the victim across New Haven Avenue to the yard of a house, dropped her to the ground, partially removed her pants, and forced her to have sexual relations with him.

Four days later, on March 10, 1983, two Milford police officers drove to the defendant's home and "informed him that his name had come up in an investigation." One

of the officers, William Graham, asked the defendant whether he would agree to meet at the police station later in the day to discuss the matter. The defendant agreed and went to the station that afternoon. At the subsequent interview, Graham initially told the defendant that "he was not under arrest and he could leave any time. He was free to go." The defendant then gave an oral statement accounting for his time on the night of the assault. Prior to signing the typewritten transcript of that account, the defendant was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 467-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and then signed a standard waiver form.

In his written statement of March 10, 1983, the defendant denied any involvement in the sexual assault. He stated that he

had left the party at about 1 a.m. with his girlfriend, and two other guests. The defendant stated that the four had departed in a car, and that he had been taken directly home and had gone straight to bed.

The defendant was arrested on March 23, 1983, after being formally charged in a two count information with the crimes of sexual assault in the first degree and unlawful restraint in the first degree. At the trial, the three persons with whom the defendant, in his March 10, 1983 statement, said that he had been driven home, testified that he had remained at the party after they had departed. The party hostess testified similarly. The defendant, testifying in his own behalf, stated that he had hitchhiked home after leaving the party and that someone named Mark had picked him up

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and driven him home. The defendant was convicted of the crimes charged and sentenced to a total term of six years. From the Appellate Court judgment affirming the judgment of the trial court, the defendant has brought the present appeal.

I

The defendant first claims that the Appellate court erred in ruling that the unwarranted "missing witness" instruction given by the trial court constituted harmless error. The trial court charged the jury as follows: "It is the law of the State that the failure of a party to call a witness or witnesses who are within its power to produce entitles you, the jury, to infer that the testimony of such witness or witnesses would be unfavorable to that party.

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"In this case, the defendant testified that, after leaving the party ... he hitch-hiked and received a ride from a person whose first name he knew to be Mark. Consistent with the rule I have just stated, you may consider the failure of the defendant to call this person."

The missing witness instruction is commonly known as the "Secondino charge," by virtue of this court's holding in Secondino v. New Haven Gas Co., 147 Conn. 672, 165 A.2d 598 (1960). The Secondino court reiterated the rule that "'[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause.'" Id., 675; Ezzo v.

Geremiah, 107 Conn. 670, 677, 142 A. 461 (1928). "There are two requirements for the operation of the rule: The witness must be available, and he must be a witness whom the party would naturally produce." Secondino v. New Haven Gas Co., supra; see State v. Roma, 199 Conn. 110, 120, 505 A.2d 717 (1986); State v. Hart, 198 Conn. 424, 428, 503 A.2d 588 (1986).

The State concedes that the Secondino charge given by the trial court in the present case was both unwarranted and incorrect as a matter of law. First, the state offered no evidence in support of the instruction to show that the missing witness, Mark, was available. See State v. Boyd, 178 Conn. 600, 605, 424 A.2d 279 (1979); State v. Long, 171 Conn. 18, 21, 368 A.2d 199 (1976). Second, the instruc-

tion as delivered did not adequately apprise the jury of both prongs of the Secondino rule. See Secondino v. New Haven Gas Co., supra, 676-77. To require a reversal, however, error must be harmful. Id. 677.

The Appellate Court reasoned that, "[b]ecause the defendant's claim of error involves only an evidentiary matter, and not the violation of a constitutional right, the burden of proving the harmfulness of the charge rests upon the defendant." State v. Shashaty, supra, 391-92. In this appeal the defendant suggests that the Secondino charge, "even if otherwise proper under local rules of evidence," implicates constitutional rights because "it violates the presumption of innocence and shifts the burden of proof from the prosecution to the defendant." This court,

however, has held to the contrary. See State v. Annunziato, 169 Conn. 517, 538, 363 A.2d 1011 (1975), cert. denied, 441 U.S. 966, 99 S.Ct. 2417, 60 L.Ed.2d 1072 (1979); see also State v. Peary, 176 Conn. 170, 182, 405 A.2d 626 (1978). We have recognized, moreover, that the evidentiary basis for the Secondino inference derives from the maxim that "'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.'" Ezzo v. Geremiah, supra, quoting Blatch v. Archer, 1 Cowper 63, 65 (1774)(Lord Mansfield); see also Throckmorton v. Chapman, 65 Conn. 441, 454, 32 A. 930 (1895). Accordingly, we agree with the Appellate Court that, because the erroneous instruction engenders a claim

arising under state law and does not involve any constitutional right, the defendant bears the burden of proving harmful error. See State v. Silva, 201 Conn. 244, 250, 513 A.2d 1202 (1986); State v. Conroy, 194 Conn. 623, 627, 484 A.2d 448 (1984).

In order to meet his burden of proving that the unwarranted Secondino charge constituted harmful error, the defendant must show that the charge was likely to have affected the verdict. State v. Brown, 187 Conn. 602, 611, 447 A.2d 734 (1982); State v. McClain, 171 Conn. 293, 300, 370 A.2d 928 (1976). This he had not done. The state's case against the defendant was a strong one. See generally State v. Gonzalez, 197 Conn. 677, 682-83, 500 A.2d 1330 (1985). The victim positively identi-

fied the defendant as her attacker. Further, the condition of the clothing worn by the victim the evening of March 6, 1983, which the state introduced into evidence, tended to corroborate the victim's version of the facts. Her sweater and slacks were stained with soil and grass, and traces of sperm were found on her underwear. Additionally, the credibility of the defendant had already been significantly damaged when he admitted, while being cross-examined, that his statements to the police on March 10, 1983, had been lies. In the light of this admission, any further harm to the defendant's credibility resulting from the Secondino instruction must reasonably be seen to have been minimal.

Finally, it is significant to note that the victim's factual account accusing the

defendant of sexual assault and the defendant's alibi story at trial were not necessarily mutually exclusive. In other words, even if the jurors believed the defendant's claim that he had hitchhiked home after the party and had received a ride from someone named Mark, they might have also believed that the defendant had assaulted the victim prior to being picked up. The defendant's failure to show any inconsistency between his alibi and the victim's complaint further supports our conclusion that the defendant has not carried his burden of proving that the court's error was harmful under the standard application to a nonconstitutional error. We therefore hold that, under the circumstances of this case, the Appellate Court correctly determined that the erroneous Secondino charge given

by the trial court was harmless.

II

The principal issue in this appeal is whether the state may introduce evidence of a defendant's silence after he has received Miranda warnings but prior to his arrest. In its rebuttal presentation, the state questioned Graham, the police officer who had taken the defendant's statement on March 10, 1983, about the defendant's failure to correct that statement between March 10 and March 23, the date of his arrest.[1] The defendant challenges the ruling of the Appellate Court that the error of the trial court in permitting such questioning by the state was harmless

1 The following portion of the transcript records, in relevant part, the rebuttal examination of Officer William Graham:

beyond a reasonable doubt. The state, on the other hand, urges us to affirm the judgment of the Appellate Court upon the alternative ground that, because the defendant was not in custody when he gave his March 10, 1983 statement, any evidence of the defendant's silence prior to his arrest was properly admitted.

---

1 (continued) "Q. And between March 10, which you previously testified was the date that you had occasion to interview Mr. Shashaty and March 23, the date on which he was placed under arrest, at any time, did you receive any contact from him and information from him that he had either been mistaken or lied in his statement to you?

"A. No.

"Q. At any time during that period [of] time, namely March 10 to March 23, were you advised of the existence of any individual by the name of Mark, who allegedly picked him up while he was hitchhiking home from [the] party on March 6?

"A. No."

Our analysis of the circumstances of this case differs from that of the Appellate Court. The Appellate Court assumed that the questioning by the police of the defendant on March 10, 1983, constituted "custodial interrogation." See State v. Shashaty, supra, 393. The court then held that the admission into evidence of the defendant's subsequent silence was erroneous under the rule of Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976), that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." See State v. Shashaty, supra. Relying upon Chapman v. United States, 547 F.2d 1240 (5th Cir.), cert. denied, 431 U.S. 908, 97 S.Ct. 1705,

52 L.Ed.2d 393 (1977), however, the Appellate Court concluded that the Doyle error in the present case was harmless beyond a reasonable doubt. State v. Shashaty, supra, 394-95. The Chapman court had stated that, "[w]hen there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error." Chapman v. United States, supra, 1250.

We disagree with the Appellate Court that the defendant was in police custody on March 10, 1983, when he gave his alibi statement that later proved to be false.

As we have detailed, Graham and an accompanying Milford police officer went to the defendant's home and asked the defendant whether he would agree to stop by the police station to discuss the alleged sexual assault. The defendant was not in the company of the police when he arrived at the station later that day. At that time Graham told the defendant that "he was not under arrest and he could leave any time." Further, the defendant left the police station freely, approximately one hour after the interview had begun. It is clear that, under such circumstances, the March 10, 1983 interview of the defendant was not a "custodial interrogation." See Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); Hunter v. State, 590 P.2d 888, 895 (Alaska 1979); 1

W. LaFave & J. Israel, Criminal Procedure (1984) § 6.6.

Because the defendant was not under arrest or otherwise in custody when he went to the police station on March 10, 1983, the giving of Miranda warnings was not essential before the police interrogated him. "[P]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, supra; see Miranda v. Arizona, supra, 467-69; State v. Vitale,

197 Conn. 396, 411, 497 A.2d 956 (1985).

The issue before us, however, is not whether Miranda warnings were required, but whether, once the police had given them, the defendant may have relied upon their assurance of his right to remain silent so that the rebuttal testimony concerning his failure, after receiving the warnings, to correct the statement he had made to the police violated his right to due process. Neither this court nor any federal court has yet had occasion to consider the issue before us, whether the use of a defendant's pre-arrest, but post-Miranda, silence violates his due process rights under the United States constitution.[2] As we have

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2 The defendant nominally makes his due process claim under both the state and federal constitutions. "The due process clauses of the United States constitution,

noted, Doyle v. Ohio, proscribes the use for impeachment purposes of a defendant's silence subsequent to his arrest and after receiving Miranda warnings. "The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach

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2 (continued) § 1, of the fourteenth amendment, and of the Connecticut constitution, article first, § 8, can be treated together because they 'generally have the same meaning and impose similar constitutional limitations.' Keogh v. Bridgeport, 187 Conn. 53, 60, 444 A.2d 225 (1982); McKinney v. Coventry, 176 Conn. 613, 616, 410 A.2d 453 (1979)." Gunther v. Dubno, 195 Conn. 284, 297 n. 13, 487 A.2d 1080 (1985). The defendant proffers no argument for enhanced state constitutional protection and, on the facts of this case, we see no reason independently to perform such an analysis. See State v. Thompson, 197 Conn. 67, 76 n. 6, 495 A.2d 1054 (1985).

his trial testimony." (Emphasis added.) Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 639, 88 L.Ed.2d 623 (1986); see also State v. Zeko, 177 Conn. 545, 553-54, 418 A.2d 917 (1979).

Doyle has not been extended to apply to a defendant's silence before he has been taken into custody and given Miranda warnings; Jenkins v. Anderson, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 2486 (1980); or to his silence following his arrest but before receiving such warnings. Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). Doyle has also been held inapplicable to cross-examination of a defendant concerning his failure to inform the police, at the time of his statement following his arrest and receipt of Miranda warnings, of the

inconsistent version of the crime given in his trial testimony. Anderson v. Charles, 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L.Ed.2d 1173 (1980); see State v. Casey, 201 Conn. 174, 184-86, 513 A.2d 1183 (1986); State v. Talton, 197 Conn. 280, 295, 497 A.2d 35 (1985).

Two state courts have dealt with the issue facing us today, but have reached different conclusions. The Supreme Judicial Court of Maine held that the use of pre-arrest silence following Miranda warnings could be used to impeach a defendant, who had made no statement to the police, concerning "his failure to tell the officers the story he told on the stand." State v. Robinson, 496 A.2d 1067, 1072 (Me. 1985). The Wisconsin Supreme Court, however, decided that "[r]eceipt of the

Miranda warning is the important factor in the Doyle analysis, not whether the defendant had been arrested," and that, "[t]herefore the Doyle rationale protects post-Miranda silence whether occurring before or after arrest."[3] State v. Fencl, 109 Wis.2d 224, 234, 325 N.W.2d 703 (1982).

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3 The Wisconsin Supreme Court also went on to conclude that the use of pre-arrest silence for impeachment, even in the absence of Miranda warnings, constituted a violation of the defendant's fifth amendment privilege against self-incrimination. State v. Fencl, 109 Wis.2d 224, 233 n. 6, 235-38, 325 N.W.2d 703 (1982). We have held to the contrary based upon the statement in Jenkins v. Anderson, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 2486 (1980), as follows: "We conclude that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility." State v. Leecan, 198 Conn. 517, 504 A.2d 480, cert. denied, ___ U.S. ___, 106 S.Ct. 2922, 91 L.Ed.2d 558 (1986).

In this case there is no necessity for us to venture into this unsettled area of federal constitutional law and we reject the state's invitation to do so. Even if the admission of the rebuttal testimony concerning the defendant's failure to return to the police in order to correct the statement he previously had given constituted a constitutional error, as the Appellate Court concluded, we agree with the further analysis made by that court holding that its admission was harmless beyond a reasonable doubt. See State v. Shashaty, supra, 394-95. As the Appellate Court noted, "the state's attorney merely asked the officer as a factual matter whether 'at any time, [he] receive[d] any contact from [the defendant] and information from him that he had either been

mistaken or lied in this statement.' After the officer answered no, the state's attorney then asked whether the officer had been 'advised of the existence of any individual by the name of Mark, who allegedly picked [the defendant] up while he was hitchhiking home from [the party] on March 6?" When the officer stated that he had not, the line of questioning was dropped." Id.

The defendant does not claim any further reference at trial to his silence.[4]

---

4 The state conceded at oral argument that it had offered its rebuttal evidence of the defendant's pre-arrest silence both to impeach the defendant's credibility and, substantively, to demonstrate his consciousness of guilt. In its instructions to the jury, however, the court made no reference to the applicability of such evidence to show the defendant's consciousness of guilt. Further, because the transcript does not record the closing arguments of counsel, we cannot ascertain

The credibility of his alibi defense advanced at trial already had been "substantially damaged," as the Appellate Court observed, by the testimony of his first alibi contained in his statement to the police, that he had been in the company of those witnesses at the time the crime occurred. Coupled with the devastating effect of the defendant's prior admittedly contrived alibi upon the credibility of his testimony at trial, the evidence of the crime presented by the state must fairly be characterized as overwhelming. The defend-

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4 (continued) whether the state argued for such a substantive use of the defendant's silence. The use of the defendant's pre-arrest silence on rebuttal rather than on cross-examination of the defendant did not deprive him of an opportunity to offer an explanation for his silence. He could have offered further testimony, his own or that of others, to explain or refute the state's rebuttal testimony.

ant was not a stranger to the victim, as they admittedly had been in each other's presence for several hours at the relatively small party that had preceded the crime. No serious issue of her ability to identify him has been raised. As we have mentioned in discussing the erroneous Secondino charge, the victim's testimony concerning the circumstances of the assault was corroborated by the examination of her clothing following her report of the incident to the police. We agree with the Appellate Court that the criteria for finding a Doyle error harmless beyond a reasonable doubt as set forth in Chapman v. United States, supra, 1249-50, were adequately satisfied in this case.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

APPENDIX C

DECISION OF THE APPELLATE COURT

STATE OF CONNECTICUT V. TIMOTHY SHASHATY

8 Conn. App. 387 (August 5, 1986)

HULL, SPALLONE and BIELUCH, Js.

Hull, J. The defendant was convicted after a jury trial of sexual assault in the first degree and unlawful restraint in the first degree, in violation of General Statutes §§ 53a-70(a) and 53a-95(a), respectively. The defendant appeals from his judgment of conviction claiming that the trial court made two errors: (1) in giving the jury a "missing witness" instruction adverse to the defendant when there was no showing that the witness was available; and (2) in permitting the prosecution to present evidence that the defendant exercised his right to remain

silent after having been given Miranda warnings. We find no harmful error.

The jury reasonably could have found the following facts. On March 6, 1983, the victim[1] walked to a party at the Milford home of Emily Lewis. She arrived at the

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1 General Statutes § 54-86d provides: "Any person who has been the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault or injury or risk of injury to, or impairing of morals of, children; provided the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding, (2) the identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the defense."

General Statutes § 54-86e provides: "The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b, or 53a-73a, or injury or risk of injury, or impairing

party at 6 p.m. The defendant arrived at the party at 7:30 p.m., accompanied by a friend. Later in the evening, at about 11 p.m., a confrontation arose between the victim and another guest over the disappearance of the victim's purse. The victim was upset after the fight and locked herself in the bathroom. The defendant entered the bathroom and talked to the victim for some time. Eventually, the party broke up and the victim started to walk home by herself.

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1 (continued) of morals under section 53-21, or of an attempt thereof shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused."

In order to uphold the spirit of these statutes, we will not disclose the name or address of the victim. She will be referred to herein as "the victim."

The victim testified that at the party, the defendant tried to kiss her. She resisted and told the defendant that she had to go home. The defendant caught up with her on her walk home and she rebuffed his demand that she walk with him. The defendant then picked her up, put her over his shoulder and began walking down the street with her. He put her down after she agreed to walk with him and hold his hand. The defendant soon put her over his shoulder again, and despite her screams, carried her through the yards of several residences before putting her down and forcing her to have sexual intercourse with him. After a few minutes, the defendant fled and the victim walked home by herself.

Lieutenant William Graham of the Milford police department testified that

the victim came to the police on March 9, 1983, and reported the incident. While awaiting the results of various laboratory tests, Milford police officers, on March 10, 1983, asked the defendant to stop by the police station to answer some questions. The defendant agreed, and was subsequently interviewed by police officers regarding the victim's sexual assault complaint. The defendant asserted his innocence after having been given full Miranda warnings. Miranda v. Arizona, 483 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He made a written statement that he had left the party with his girlfriend Melissa Junget, and two people named Billy McClafferty and Maryann Kopec. In the written statement, which was accompanied by a signed waiver of the defendant's con-

stitutional rights, the defendant asserted that the four left in Kopec's car and that the defendant was driven to his house where he went to bed. Lewis, Kopec, McClafferty and Junget all testified, however, that the defendant remained at the Lewis house after Junget, Kopec and McClafferty had departed.

The defendant testified at trial that he did attend the Lewis party and had expected to get a ride home with Lewis' boyfriend. When the boyfriend decided to spend the night at the Lewis house, the defendant had to hitchhike home. He stated that he was picked up by someone named "Mark" and driven to his house. This person was never called as a witness and in its charge to the jury, the court gave a "missing witness" instruction respecting the defendant's failure to call him.

The defendant's first claim on appeal concerns the "missing witness" instruction given to the jury.[2] The court charged the jury as follows: "the failure of a party to call a witness ... who ... [is] within its power to produce entitles you, the jury, to infer that the testimony of such witness ... would be unfavorable to that party. In this case, the defendant testified that, after leaving the party at Emily Lewis's home, he hitchhiked and received a ride from a person whose first name he knew to be Mark. Consistent with the rule I have just stated, you may consider the failure of the defendant to call this person."

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2 Whether the charge was requested or given sua sponte is in dispute.

Secondino v. New Haven, 147 Conn. 672, 165 A.2d 598 (1960), is the seminal case in Connecticut on the "missing witness" doctrine. In Secondino, the court stated that "'[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause.' ... There are two requirements for the operation of the rule: [t]he witness must be available, and he must be a witness whom the party would naturally produce." Id., 675. A Secondino charge may not be given, however, unless the party claiming the benefit of the adverse inference proves that the missing witness is in fact available to the other party. State v. Shindell, 195 Conn.

128, 138-39, 486 A.2d 637 (1985); State v. Boyd, 178 Conn. 600, 605, 424 A.2d 279 (1979).

The state offered no evidence as to the availability of "Mark" and it concedes that the Secondino charge delivered by the trial court was both unwarranted and incorrect as a matter of law. The state claims, however that the defendant has not established, as he must, the harmfulness of the trial court's error.

When a defendant's claim of error on appeal is not of a constitutional nature, the burden rests upon the defendant to demonstrate that the claimed erroneous action of the trial court would have been likely to affect the result. State v. Gonzalez, 197 Conn. 677, 681, 500 A.2d 1330 (1985); State v. Cooper, 182 Conn. 207,

212, 438 A.2d 418 (1980); State v. Ruth, 181 Conn. 187, 197, 435 A.2d 3 (1980). Because the defendant's claim of error involves only an evidentiary matter, and not the violation of a constitutional rights, the burden of proving the harmfulness of the charge rests upon the defendant. See State v. Gonzalez, supra, 681.

The defendant offers only one statement to support his claim of harm. He claims in his brief that "permitting such an inference to be drawn against a defendant in a criminal case under any circumstances violates the presumption of innocence and denies due process of law." This statement is insufficient to support the defendant's burden of proving harmfulness.

As the only evidence of the defendant's alibi was his own testimony, it is obvious

that his credibility was very important. That credibility had been severely damaged already, however, when he admitted that he lied about his whereabouts to the police in his written statement. In light of that repudiated statement and the testimony of the victim herself, any prejudice to the defendant by the erroneous Secondino charg is minimal. When faced with a similar situation, our Supreme Court in State v. Gonzalez, supra, held that comments made b the prosecution with respect to the failur to call a witness constituted harmless error. We likewise conclude that the erro was harmless.

The defendant's second claim is that the trial court erred in permitting the state to question a police officer to show that between the time of his first state-

ment and his arrest, the defendant did not contact the police to correct that statement. According to the defendant, introduction of this evidence violated his right to remain silent as interpreted by the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). We agree.

It has long been clear that when an accused is in custody, "our law affords him the right to reply to [a] question or statement, or to remain silent." State v. Ferrone, 97 Conn. 258, 266, 116 A. 336 (1922). In Doyle v. Ohio, supra, 619, the United States Supreme Court determined that this right is violated by "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after [he] receiv[es] Miranda warnings..." The

state does not contest this general rule but argues that where, as here, a defendant makes a statement, his silence, after custodial interrogation has ended, may then be used for impeachment. In support of this argument, the state relies on the rule that if the defendant chooses not to remain silent any statement he makes "after Miranda warnings have been given, relating to the facts of the crime with which [he] is charged, may be used to impeach his credibility by illustrating inconsistencies between that statement and a different exculpatory statement given during his in-court testimony. State v. Reid, 193 Conn. 646, 480 A.2d 463 (1984)." State v. Apostle, 8 Conn. App. 216, 222, ___ A.2d ___ (1986).

This court has recently rejected the

state's claim that post-statement silence may be used for impeachment purposes. State v. Apostle, supra. In Apostle, a case that is factually very similar to the present case, we held that the state may not question a defendant or comment about his failure to correct, after a police interrogation has ended, a false statement made during that interrogation.[3] That decision was based, in part, on the fact that "[a] defendant may reassert his right to remain silent at any time, and if he ceases to answer questions, or to come for-

3 In State v. Apostle, 8 Conn. App. 216, 227-28, ___ A.2d ___ (1986), in contrast to this case, the state questioned the defendant, not the police officer, about his failure to change his statement. We view this difference to be of no significance. It is error to admit evidence of a defendant's failure to change a statement after in custody interrogation has ended regardless of how that evidence is offered.

ward with additional or correcting informa
tion after questions are no longer being
asked of him, there is a reasonable possi-
bility that he is relying upon that right.
Id., 224. Accordingly, we conclude that
the trial court should not have allowed th
state to question the police officer abou
the defendant's failure to correct his
statement.

Having determined that the trial cour
erred, we must next determine whether
reversal of the defendant's conviction mus
follow. "Under certain circumstances, th
state's use of a defendant's post-arrest
silence does not constitute reversible
error. In limited instances, '"[w]hen
there is but a single reference at trial
the fact of defendant's silence, the refe
ence is neither repeated nor linked with

defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error." Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir.), cert. denied, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977)....'" State v. Apostle, supra, 227, quoting State v. Zeko, 177 Conn. 545, 555, 418 A.2d 917 (1979). We conclude that applying these standards, this case presents one of those "few instances"; State v. Apostle, supra; where the error was harmless.

Here, in contrast to Apostle, the state did not comment on the defendant's failure to change his statement. Rather, the state's attorney merely asked the officer

as a factual matter whether "at any time, [he] receive[d] any contact from [the defendant] and information from him that he had either been mistaken or lied in his statement." After the officer answered no, the state's attorney then asked whether the officer had been "advised of the existence of any individual by the name of Mark, who allegedly picked [the defendant] up while he was hitchhiking home from Emily Lewis's party on March 6?" When the officer stated that he had not, the line of questioning was dropped. This testimony was not commented on or emphasized in closing argument. Additionally, the defendant's alibi defense had already been substantially damaged by introduction of the statement he gave to the police which was contradicted by four witnesses in addition to the

victim. In the light of these factors, we conclude that it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible questioning.

There is no error.

In this opinion the other judges concurred.

Supreme Court, U.S.
FILED
DEC 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-874

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

TIMOTHY C. SHASHATY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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Printed by
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QUESTION PRESENTED

WHETHER THE ADMISSION OF EVIDENCE OF THE PETITIONER'S PRE-ARREST, POST-MIRANDA SILENCE, RELATING TO HIS FAILURE TO CORRECT A FALSE ALIBI HE HAD GIVEN TO POLICE IN A WRITTEN STATEMENT, AMOUNTED TO A VIOLATION OF DOYLE V. OHIO, 426 U.S. 610 (1976), WHEN THE WRITTEN STATEMENT HAD BEEN PRECEDED BY THE PETITIONER'S PRE-ARREST, PRE-MIRANDA ORAL STATEMENT TO THE SAME EFFECT?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES. i

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED. iii

OPINION BELOW vii

STATEMENT OF THE CASE 1

A. Facts Underlying The Petitioner's State Convictions. 1

B. Facts Relating To The Petitioner's Failure To Correct A False Alibi He Had Given To Police Officers 8

C. State Appellate Proceedings 12

REASONS FOR DENIAL OF THE PETITION. 16

I. The Petition Presents An Isolated, Academic Claim Unworthy Of Review By This Court 16

II. The Decision Of The Connecticut Supreme Court Presents No Conflict Of Authority. . . . 19

III. The Petitioner's Claim Is Insubstantial On Its Merits. . 23

CONCLUSION. 27

TABLE OF AUTHORITIES

CASES **PAGE**

Doyle v. Ohio, 426 U.S. 610 (1976) . . . . . passim

Greer v. Miller, ___U.S.___, 107 S.Ct. 3102, reh'g. den., ___ U.S. ___, 108 S.Ct. 30 (1987) 23

Jenkins v. Anderson, 447 U.S. 231 (1980) 19

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . passim

Oregon v. Mathiason, 429 U.S. 492 (1977) 18

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 17

South Dakota v. Neville, 459 U.S. 553 (1983) 24

State v. Fencl, 109 Wis.2d 224, 325 N.W.2d 703 (1982) 15, 20

State v. Robinson, 496 A.2d 1067 (Me. 1985) 15, 20

State v. Shashaty, 205 Conn. 39 ___ A.2d ___ (1987) 9, 14

United States ex rel. Miller v. Greer, 789 F.2d 438 (7th Cir. 1986) 22

Wainwright v. Greenfield, 474 U.S. 284 (1986) 23

STATUTES

Conn. Gen. Stat. §53a-70 (1983 Rev.) 8

Conn. Gen. Stat. §53a-95 (1983 Rev.) 8

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

OPINION BELOW

The opinion of the Connecticut Supreme Court, upon certification of the case from the Connecticut Appellate Court, is reported at 205 Conn. 39, ___A.2d ___ (1987), and is reproduced in the petitioner's appendix. The opinion of the Connecticut Appellate Court is reported at 8 Conn. App. 387, 513 A.2d 172 (1986) and also is reproduced in the petitioner's appendix.

STATEMENT OF THE CASE

A. Facts Underlying the Petitioner's State Convictions

On March 6, 1983, the victim, an eighteen-year-old senior in high school, attended a party at the home of her friend, Emily Lewis, in Milford, Connecticut. The party was in honor of Jack Athens, Lewis's boyfriend. Approximately twenty-five guests attended the party, including the petitioner, and a keg of beer was provided for refreshment.

The victim and the petitioner became acquainted at the party and, at about 9:00 p.m., drove to a nearby convenience store to purchase some cigarettes for several of the guests. The two engaged in small-talk during the half-mile drive and returned to the party no more than five minutes later.

Later in the evening, at about 11:00 p.m., a confrontation arose between the victim and another guest, Sherri Athens, regarding the disappearance of the victim's purse. The confrontation escalated into a physical struggle between the two women and the victim ultimately retreated to an upstairs bathroom. Shortly thereafter, the petitioner entered the bathroom and spoke to the victim.

By the time the victim had left the bathroom the party was over and only she, Emily Lewis, Jack Athens and the petitioner remained in the house. Lewis and Athens eventually went upstairs, leaving the victim and the petitioner downstairs. The petitioner talked to the victim for some time about the incident with Sherri Athens and, at some

point, tried to kiss the victim. She resisted and told the petitioner that she had to go home. With that, the victim left the house between 12:30 a.m. and 1:00 a.m. and proceeded to walk home.

Unaware that the petitioner was following her, the victim walked down Carrington Avenue, despite the heavy rain and fog of that night. The petitioner caught up with the victim at Gulf Street and demanded that she walk with him. Ignoring her expressed desire to walk alone, the petitioner picked the victim up, threw her over his shoulder and started walking down the street. Despite the victim's screams and protests, the petitioner walked in this manner for about one block and informed the victim that she would be released on

one condition: "If I put you down, you have to let me hold your hand and walk with you." The victim acceded to the petitioner's demand and walked hand-in-hand with him for another block.

The two eventually reached a point where the victim, in order to reach her home, had to turn left. The petitioner, intent on turning to the right, once again picked up the victim and, ignoring her screams, carried her through a wooded area behind a residential development and then dropped her to the ground.

Next, the petitioner pinned the victim to the muddy ground by placing his knees on her arms. She screamed, whereupon the petitioner put his hands over her mouth. She attempted to bite the petitioner, and did so "just

barely", whereupon the petitioner threatened to hit her. Having subdued the victim, the petitioner unzipped her jacket and then pulled off one leg of her pants and her panties. In a futile effort to prevent the rape, the victim told the defendant that she had venereal disease. The defendant responded that "he didn't care".

With that, the petitioner forcibly and fully penetrated the victim's vagina with his penis. After about two minutes of forcible intercourse, the petitioner fled. The victim dressed herself and walked home.

The next morning, the victim reported the sexual assault to a family member. The next day, March 8, 1983, the victim gave a statement to the Milford Police Department and was

examined by a physician. The examination revealed no evidence of vaginal trauma and vaginal smears tested negative for pregnancy, spermatozoa and venereal disease.

Subsequent examination of the victim's clothes, however, revealed evidence of sexual intercourse. "Crusty stains" on the crotch area of the victim's slacks and panties tested positive for acid phosphatase, a substance found in high concentration in semen. Fragments of soil and vegetation were detected on the slacks and panties; a soil stain was visible on the back pocket area and along one side of the slacks. Vegetation and mineral particles were detected on the victim's sweater.

Chemical analysis of the saliva and

blood of the victim and the petitioner revealed that both had "O" blood types, but that the petitioner carried an "H" antigenic substance in his body fluids, thus indicating that he was a so-called "O" "secretor". Analysis of the victim's blood revealed no evidence of antigenic substances, indicating that she was a "non-secretor". Testing of the "crusty stains" on the victim's slacks and panties revealed they were deposited by an "O" "secretor", consistent with the characteristics of the petitioner's blood.1

Upon these facts, as were reasonably found by the jury in the Connecticut

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1 Approximately 80% of the population are "secretors". However, had the petitioner been a "non-secretor" or had a different blood type, he could have been excluded as the source of the "crusty stains."

Superior Court, the petitioner was convicted on February 17, 1984, of sexual assault in the first degree; Conn. Gen. Stat. §53a-70 (1983 Rev.); and unlawful restraint in the first degree. Conn. Gen. Stat. §53a-95 (1983 Rev.). He was sentenced by the court on March 30, 1985 to a total effective sentence of six years of imprisonment.

B. Facts Relating To The Petitioner's Failure To Correct A False Alibi He Had Given To Police Officers

Milford police officers first contacted the petitioner regarding the victim's sexual assault complaint on March 10, 1983, four days after the assault. The petitioner voluntarily agreed to meet the officers at the police station later that afternoon, arrived at the police station as agreed, and was interviewed by police for

approximately ninety minutes.[2] See Respondent's Appendix, at A-1--A-7.

The petitioner was asked to account for his time on the night of the assault, which he did in some detail. This oral statement, in which the petitioner denied the accusation and proferred an alibi, was then reduced to a written statement which the petitioner signed. After his oral statement, but prior to the written statement, the petitioner was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), read a "rights waiver" form supplied by police, initialed each right on the form and then signed it. The

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[2] It is undisputed that the petitioner's statements to police, both oral and written, were freely and voluntarily given in noncustodial circumstances. See State v. Shashaty, 205 Conn. 39, 47, ___A.2d___ (1987); Petition, at 4, 17.

petitioner's written statement was contained in a printed, standardized police form and included the following recitation:

> I, Timothy C. Shashaty (6-6-62), age 20, of 345 Pond Point Avenue, City of Milford, State of Connecticut, make the following statement without promise, knowing it may be used in court. I have been advised that I have a right to consult with a lawyer, to stand mute, and to sign nothing. These Rights I hereby waive. I make this statement to Sergeant W. Graham, whom I know to be a member of the Milford Police Department.

The text of the written statement, which merely recounted the petitioner's prior oral statement, recited that the petitioner had left the Lewis house at 1:00 a.m., with his girlfriend Melissa Jungett, William McCafferty and Maryann Kopec in Kopec's car and was driven directly to his home, where he im-

mediately went to bed. At trial, the petitioner admitted that he had lied in the written statement as to his whereabouts, but asserted a new alibi that he had hitchhiked home from the party and had been picked up by a person he knew as "Mark", who drove him home.

In the absence of the jury, the state proffered rebuttal evidence that the petitioner had not - after the interview of March 10, 1983 and before his formal arrest on March 23, 1983- informed the police that he had lied in his statements to police nor did he inform police of the completely different alibi he later asserted at trial. Over the petitioner's objection and exception, the trial court permitted the state to so inquire. Officer Graham testified, in relevant part, as follows:

[Mr. Kelly:] And between March 10, which you previously testified was the date that you had occasion to interview Mr. Shashaty and March 23, the date on which he was placed under arrest, at any time, did you receive any contact from him and information from him that he had either been mistaken or lied in his statement to you?

[A:] No.

[Mr. Kelly]: At any time during that period or time, namely March 10 to March 23, were you advised of the existence of any individual by the name of Mark, who allegedly picked him up while he was hitchhiking home from Emily Lewis's party on March 6?

[A:] No.

C. State Appellate Proceedings

The petitioner timely appealed his conviction to the Connecticut Appellate Court, raising two issues: (1) That the trial court erred in giving the jury and unwarranted "missing witness" instruction as to "Mark", the person who had

picked up the petitioner while he hitchhiked home from the Lewis party; and (2) that the trial court erred in permitting the state to introduce evidence of the petitioner's silence prior to his arrest, but after receiving Miranda warnings. The Appellate Court affirmed the convictions, holding that, as to the first evidentiary issue, the petitioner had not proven the harmfulness of the trial court's erroneous instruction and, as to the second issue, holding that the state's comment on the petitioner's post-Miranda warnings silence was harmless beyond a reasonable doubt. See State v, Shashaty, 8 Conn. App. 387, 394, 513 A.2d 172 (1986); Petitioner's Appendix, at 16c-18c.

The Connecticut Supreme Court granted certification and affirmed the

Connecticut Appellate Court's decision. The state supreme court agreed that the petitioner had not demonstrated the harmfulness of the trial court's "missing witness" instruction and that, under any standard of review, the state's comment on the petitioner's silence did not warrant reversal of his convictions. See State v. Shashaty, 205 Conn. at 50-51; Petitioner's Appendix, at 1b-29b.

The court declined to rule that, because the case involved pre-arrest, post-Miranda warnings silence, there was no error under Doyle v. Ohio, 426 U.S. 610 (1976), and its progeny, as opposed to the finding of harmless error made by the Connecticut Appellate Court. See State v. Shashaty, 205 Conn. at 50; Petitioner's Appendix, at 26b. Noting

the two state court decisions which had addressed the question with different results; see State v. Robinson, 496 A.2d 1067 (Me. 1985); State v. Fencl, 109 Wis.2d 224, 325 N.W.2d 703 (1982); the court held: "Even if the admission of the rebuttal testimony concerning the [petitioner's] failure to return to the police in order to correct the statement he previously had given constituted a constitutional error, as the Appellate Court concluded, we agree with the further analysis made by that court holding that its admission was harmless beyond a reasonable doubt". 205 Conn. at 51; Petitioner's Appendix, at 29b.

REASONS FOR DENIAL OF THE PETITION

I. The Petition Presents An Isolated, Academic Claim Unworthy Of Review By This Court

This is not a case involving prosecutorial use of a criminal defendant's post-arrest, post-Miranda warnings silence. Doyle v. Ohio, 426 U.S. 610 (1976) (Doyle); Miranda v. Arizona, 384 U.S. 436 (1966) (Miranda). Rather, this is a case involving the unusual issue of the state's use of a criminal defendant's pre-arrest, post-Miranda warnings silence under circumstances in which evidence of the defendant's silence was independently admissible on other grounds. As such, the petition presents an isolated permutation of Doyle not having far-reaching precedential effect upon American jurisprudence generally. The

question simply fails to extend "beyond the academic or the episodic". Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

First, the Doyle issue presented by the petition hinges upon a comparatively unique circumstance: the police officers in this case, out of an overabundance of caution, gratuitously informed the defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), notwithstanding the undisputed fact that he was not in police custody at the time his written statement was executed.

Assessing these circumstances, the Connecticut Supreme Court discovered only two state court decisions even discussing the significance of pre-arrest, post-Miranda silence. See Petitioner's Appendix, at 24b-25b. The

petitioner has cited no other state or federal court which has considered this issue, nor is the respondent aware of any. This is not surprising given the fact that accused persons presumably are given Miranda warnings only after their arrest. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

The basis for the petition is attenuated for a second reason. The "silence" upon which the petitioner claims the state impermissibly commented pertains to his failure to correct a false written statement accompanied by Miranda warnings. However, the same false statement had already been given to police by the petitioner orally, prior to his arrest and prior to any Miranda warnings. The petitioner's "silence" after this oral statement and

prior to his arrest was, therefore, open to comment by the state without any violation of the Due Process Clause. Jenkins v. Anderson, 447 U.S. 231 (1980). The fact that Miranda warnings were given in connection with the petitioner's subsequent written statement - even assuming arguendo that Doyle applies to pre-arrest, post-Miranda warnings silence - does not change the fact that such comment by the state on the oral statement was independently admissible. In this sense, the petition presents an issue which is not only unusual and isolated; it is academic.

II. The Decision Of The Connecticut Supreme Court Presents No Conflict Of Authority

As another basis for his petition, the petitioner asserts that the decision below demonstrates a significant

conflict of authority as to the application of harmless error law to alleged Doyle violations. See Petition, at 20. Specifically, he claims that while federal courts of appeal have uniformly applied harmless error analysis to Doyle claims, they "have not standardized the measure of harmfulness in relation to Doyle violations." Petition, at 22. This claim provides no basis for the petition.

First, the petitioner assumes that comment on a defendant's pre-arrest, post-Miranda warnings silence constitutes a Doyle violation. Only one appellate court has squarely reached this conclusion. State v. Fencl, 109 Wis.2d 224, 234, 325 N.W.2d 703 (1982). See State v. Robinson, 496 A.2d 1067, 1072 (Me. 1985) (finding harmless error

on similar facts). Thus, the premise of the petitioner's harmless error argument, and therefore his assertion of a conflict of authority, is fragile indeed. None of the federal decisions upon which the petitioner relies even discusses the constitutional significance of a comment on pre-arrest, post-Miranda warnings silence. See Petition, at 20-25.

Second, the petitioner's claim that courts have not "standardized the measure of harmfulness" of Doyle violations is not premised upon the applicability of harmless error analysis, but rather upon a comparison of the "harm" perceived in each case and the "value" assigned to the error by each court. Any such comparison of decisions necessarily requires a subjective

judgment by this Court as to each case; what may be harmless error in one case might require reversal in the next. Certiorari should not be predicated upon such exquisitely fact-laden questions.

Finally, it is important to note that a pillar of the petitioner's advocacy for a "strict" harmless error test for Doyle violations has already collapsed. In support of his claim for a standard requiring overwhelming evidence of guilt in order to overcome a Doyle error, the petitioner relies on United States ex rel. Miller v. Greer, 789 F.2d 438 (7th Cir. 1986). Petition, at 23. Yet, he has failed to acknowledge that the case was reversed by this Court on June 26, 1987 upon a finding that no Doyle violation had occurred, let alone a harmless one.

Greer v. Miller, ___U.S.___, 107 S.Ct. 3102, reh'g. den., ___ U.S. ___, 108 S.Ct. 30 (1987).

III. The Petitioner's Claim Is Insubstantial On Its Merits

The petitioner would have this Court greatly expand the confines of Doyle violations to include comments on silence after the mere utterance of Miranda warnings by a police officer, even in non-custodial circumstances. Yet, he has done so upon a record which demonstrates, even under harmless error analysis, that reversal of his convictions is unwarranted.

The petitioner's assumption that the state's comment on his pre-arrest, post-Miranda warnings silence was violative of Doyle misses the point of Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 639 (1986), in which this

Court reaffirmed the significance of arrest to the constitutional underpinnings of Doyle: "The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." (Emphasis added.) Thus, the petitioner has failed to establish that the unusual circumstances of this case even implicate the due process protections of Doyle. Cf. South Dakota v. Neville, 459 U.S. 553 (1983) (defendant's silence after statutorily prescribed warnings lacked the constitutional significance of silence following Miranda warnings).

Moreover, assuming arguendo the applicability of harmless error analysis

to this case, the record fully supports the conclusion that reversal of the petitioner's convictions is unwarranted. As the Connecticut Supreme Court held:

> The credibility of [the petitioner's] alibi defense advanced at trial already had been 'substantially damaged,'. . . by the testimony of his first alibi contained in his statement to the police, that he had been in the company of those witnesses at the time the crime occurred. Coupled with the devastating effect of the [petitioner's] prior admittedly contrived alibi upon the credibility of his testimony at trial, the evidence of the crime by the state must fairly be characterized as overwhelming.

Petitioner's Appendix, at 28b-29b. The Connecticut Supreme Court's harmless error analysis thus establishes that there exists no sound basis for reversal of the petitioner's convictions even under the "strict" harmless error test he urges this Court to adopt. Petition,

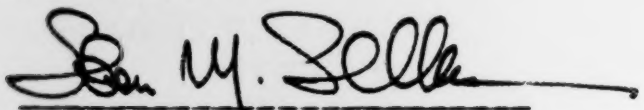
at 25. The judgment of the Connecticut Supreme Court is correct and there is, therefore, no reason for this Court to exercise its certiorari jurisdiction.

CONCLUSION

For the reasons stated, this Court should deny the petition for a writ of certiorari.

Respectfully submitted.

STATE OF CONNECTICUT,
RESPONDENT

By: 

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No. 87-874

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

TIMOTHY C. SHASHATY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX

APPENDIX
TABLE OF CONTENTS

PAGE

Excerpt From Respondent's Brief
In The Connecticut Supreme Court . . A-1

EXCERPT FROM RESPONDENT'S BRIEF IN THE CONNECTICUT SUPREME COURT

I. THE ADMISSION OF EVIDENCE OF THE DEFENDANT'S FAILURE TO INFORM POLICE OF THE ALIBI HE ASSERTED AT TRIAL, WHICH THE APPELLATE COURT HELD TO BE HARMLESS ERROR UNDER STATE V. APOSTLE, 8 CONN. APP. 216, 512 A.2d 947 (1986), WAS NOT ERROR UNDER DOYLE V. OHIO, 426 U.S. 610 (1976) AND ITS PROGENY

* * *

B. Facts Relating to the Defendant's Claim

Milford police officers first contacted the defendant regarding the victim's sexual assault complaint on March 10, 1983, four days after the crime. T. at 104. Officers Graham and Talnose, after attempts to contact the defendant by telephone proved unsuccessful, drove to the defendant's Milford home and arrived at about 10:45 a.m. T. at 65, 69, 104-05. Greeted by the defendant at the front door, Officer

Graham told the defendant that his name "had come up in an investigation" and asked him to stop by the police station later in the day to discuss the matter. T. at 73, 104. In response to the defendant's query as to "what it was all about," Graham told the defendant that he would rather discuss the matter at the police station. T. at 73-74. The defendant agreed to meet the officers at the Milford police station at 1:00 p.m. that day and the officers left. T. at 74-104. No Miranda warnings were given to the defendant by the officers at the defendant's home. T. at 74.

The defendant arrived at the police station as agreed and was escorted by Officer Graham to a conference room. T. at 105-106. The room was "fairly large," and contained a table, several

chairs and a bulletin board. T. at 106. One wall of the room was predominantly "one-way" glass, which permitted observation of the room from the outside. Id. Officers Graham and Talnose informed the defendant, prior to the interview, that he was not under arrest and was free to leave, and then told him of the sexual assault complaint lodged by the victim. T. at 106-107. The defendant was then asked to account for his time on the night of the assault, which he did in some detail. T. at 107. The defendant's oral statement, in which he denied the accusation; t. at 107; was then reduced to a written statement which the defendant signed.12 See State's Exhibit

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12 Four people were present when the defendant executed the written statement: Officers Graham and Talnose,

H. Once the statement was completed, the defendant left the police station, no more than ninety minutes after he arrived. T. at 787-78.

After his oral statement, but prior to executing the written statement, the defendant was advised of his Miranda rights,13 read a "rights waiver" form, initialed each right on the document and then signed it. T. at 68-78, 107-108. In addition, his written statement included the following recitation:

> I, Timothy C. Shashaty (6-6-62), age 20, of 345 Pond Point Avenue, City of Milford, State of Connecticut, make the following statement without

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a stenographer, and a person identified in the record only as "Mrs. Banks". T. at 77.

13 The defendant conceded in the Appellate Court that he was not under arrest at the time of his questioning. Defendant's Appellate Court Brief, at 13, See T. at 68, 78, 107-108.

> promise, knowing it may be used in court. I have been advised that I have a right to consult with a lawyer, to stand mute, and to sign nothing. These Rights I hereby wave. I make this statement to Sergeant W. Graham, whom I know to be a member of the Milford Police Department.

See State's Exhibit H; T. at 110.

The text of the written statement, in pertinent part, recited that the defendant had left the Lewis house at 1:00 a.m. with his girlfriend Melissa Junget, and two other friends, William McClafferty and Maryann Kopec in Kopec's car and was driven directly to his home, where he immediately went to bed. See State's Exhibit H; T. at 110-112. At trial, the defendant admitted that he had lied in the written statement as to his whereabouts; T. at 288; but asserted the alibi defense that he had been

picked up by "Mark" after the Lewis party and had been driven directly to his home. T. at 248, 271, 273, 286.

In the absence of the jury, the state sought to introduce rebuttal evidence that the defendant had not, after the written statement of March 10, 1983 but before his formal arrest on March 23, 1983, informed police that he had lied in his written statement or advised them of the alibi he asserted at trial. T. at 341-342. In addition, the state sought to adduce evidence of the defendant's silence in transit to the police station, after his formal arrest but before the advisement of Miranda rights at the police station. T. at 342. The trial court, after hearing the arguments of counsel, overruled the defendant's objection to the proffered

evidence and noted the defendant's exception. T. at 342.14 Officer Graham then testified, in relevant part, as follows:

> [Mr. Kelly:] And between March 10, which you previously testified was the date that you had occasion to interview Mr. Shashaty and March 23, the date on which he was placed under arrest, at any time, did you receive any contact from him and information from him that he had either been mistaken or lied in his statement to you?
>
> A. No.
>
> [Mr. Kelly:] At any time during that period or [sic] time, namely March 10 to March 23, were you advised of the existence of any individual by the name of Mark, who allegedly picked him up while he was hitchhiking home from Emily Lewis's party on March 6?
>
> A. No.

T. at 344.

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14 The transcript of trial proceedings does not disclose the basis for the defendant's objection and exception. T. at 342.